

**OPINION
65-57**

March 30, 1965 (OPINION)

Honorable Ben Meier

Secretary of State

RE: Cooperatives - Electric Cooperatives - Excise Taxes

This is in reply to your letter of March 25, 1965, in which you set forth the following facts and question:

"Senate Bill No. 41 enacted by the Thirty-ninth Legislative Assembly repealed section 10-13-07 of the North Dakota Century Code, said section provides in part that electric cooperatives subject to chapter 10-13 shall pay annually on or before July first, to the Secretary of State a fee of ten dollars for each one hundred members or fraction thereof.

"I respectfully request your opinion, with the repeal of section 10-13-07 on July 1, 1965, whether or not the electric cooperatives mentioned in this section are to pay fees for the year 1965."

Senate Bill No. 41 enacted by the Thirty-ninth Legislative Assembly does, as you have noted, repeal section 10-13-07 of the North Dakota Century Code. The Bill contains no provisions other than the statement that "section 10-13-07 of the North Dakota Century Code is hereby repealed." The Bill does not contain an emergency clause and therefore does not go into effect until July 1, 1965. See section 67 of the North Dakota Constitution. Section 10-13-07 is therefore effective until July 1, 1965.

Section 10-13-07 of the North Dakota Century Code provides:

"EXCISE TAX EXEMPTION - LICENSE FEE. - In addition to the fees payable under the general law governing cooperatives, electric cooperatives subject to this chapter shall pay annually, on or before July first, to the secretary of state a fee of ten dollars for each one hundred members or fraction thereof, but shall be exempt from all other excise taxes except as provided in chapter 57-33 of the title Taxation." (Emphasis Supplied)

The obvious effect of the repeal of this section is that after July 1, 1965, the electric cooperatives will be subject to excise taxes, such as sales tax, etc., but will not be required to pay the fee of ten dollars for each one hundred members or fraction thereof. The question arises, however, as to whether, for the year 1965, the electric cooperative will be subject to the ten dollar fee for each one hundred members or fraction thereof.

Senate Bill 41 as originally introduced was in substantially different form than that in which it was finally enacted. The original bill did not intend to repeal section 10-13-07 but rather amended it. After several amendments were adopted and discarded by

the Legislative Assembly, the final result was the outright repeal of the section. In view of the short and brief provisions of Senate Bill 41, we are unable to gather any legislative intent therefrom relative to the question at hand. We must therefore look to the general law on this subject in order to answer the question presented.

While the statute refers to a "fee," it is a fee in lieu of excise taxes and does, we believe, fall within the provisions of law governing the levy, collection, etc., of taxes, generally.

It should be noted that section 10-13-07 of the North Dakota Century Code does not require the payment of the fee until the first day of July in each year. The statutes contain the term "on or before July first." The statutes provide no specific method for collection of the fee should the electric cooperatives fail to pay it. However we presume an action could be instituted to collect such fee upon failure of the electric cooperatives to pay same. Such action could not, however, be instituted until after the first day of July, or, in other words the second day of July at the earliest, since the tax is, by the terms of the statute, required to be paid on the first day of July. It could not be delinquent therefore until after the first day of July although the cooperatives could, if they desired, pay the tax prior to the first day of July. Under present law it must be paid, at the latest, on the first day of July. However, since the repeal of section 10-13-07 will take effect on the first day of July, 1965, there would be no law in effect on that day which would require the payment of the tax. This statement is, of course, based on the assumption that Senate Bill 41 will become law on the first day of July and does not consider any referral petition which might be filed relative to the bill or any special session of the legislature which might be called prior to July 1, 1965, and at which further action relative to section 10-13-07 could be taken.

We note the statement in 84 C.J.S. 160, TAXATION, sec. 58(c):

"Repeal of statutes providing for taxation of enumerated kinds of property operates as an exemption of such property from taxation.

"Retrospective or prospective operation of repealing acts may be controlled by specific provisions contained therein. The general rule is that, in the absence of clear legislative intent to the contrary, repealing acts are to be given a purely prospective construction, although there is other authority holding that repealing acts should be construed as defeating all liability under the act repealed in the absence of a clear legislative intent to preserve such liability. Ordinarily, repeal of a tax statute does not operate to remit taxes accrued under the repealed act, especially where the legislative intent to preserve rights under the former act is clearly manifest, although repeal may prevent collection of back taxes which have not become a fixed charge prior to repeal of the statute under which claimed. Where the repealing statute contains a saving clause, the scope and effect of such clause are governed by its terms. The effect of repeal of a tax statute may be controlled by the provisions of a general statute governing the effect of

statutory repeals. Thus, under a statute in effect so providing repeal of any statute by the legislature will not operate to extinguish any liability incurred under such statute unless the repealing act expressly so provides." (Emphasis supplied)

As we have already noted, we cannot gather any legislative intent relative to this matter from the simple repeal provision contained in Senate Bill 41. There is no general statutory provision in our Code relative to the effect of a repeal of a taxing statute insofar as taxes which have not accrued are concerned. As also noted above, the liability for the tax under section 10-13-07 could not accrue until the first day of July. On the first day of July section 10-13-07 will be repealed and there would be no statute requiring the payment of the fee. Since no liability for the tax would have accrued prior to that day, it follows that the fee required by section 10-13-07 would not be required by law to be paid for the year 1965.

While not directly in point, the Supreme Court of North Dakota in *Cuthbert v. Smutz*, 68 N.D. 575, 282 N.W. 494, 502 (1938) cited with approval the statement made by the Virginia Court in *Commonwealth ex rel. Moore v. P. Lorillard Co., Inc.*, 136 Va. 258, 118 SE 323, 325:

"The taxable status of persons and property generally relate to a day certain in each year, and, when the law so provides, no taxes can be legally assessed * * * unless the conditions requisite to liability exist on the day fixed."

In the North Dakota case, the Court held, with regard to an income tax statute which was subsequently repealed through referral action, that the liability was incurred even though the amount of the tax may not have been officially demanded by the tax commissioner and that such liability was not extinguished by the repeal. In the question at hand we have an opposite situation. The liability for the tax does not accrue nor is it fixed until after the statute repealing such tax has taken effect.

In view of the fact the tax (fee) required by section 10-13-07 is due on the first day of July and in view of the fact that on the first day of July, 1965, Senate Bill 41, which repeals section 10-13-07, becomes effective, the law requiring the payment of the tax would, in fact, be repealed prior to the time the liability for the tax was finally fixed. It is therefore our opinion, barring any referral or subsequent legislative action prior to July 1, 1965, that the tax specified by section 10-13-07 for the year 1965 will not be required to be paid.

HELGI JOHANNESON

Attorney General